

# Customs Bulletin

Regulations, Rulings, Decisions, and Notices  
concerning Customs and related matters



## and Decisions of the United States Court of Appeals for the Federal Circuit and the United States Court of International Trade

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*This issue contains:*

U.S. Customs Service

T.D. 87-16

U.S. Court of Appeals for the Federal Circuit

Appeal No. 86-1441

U.S. Court of International Trade

Slip Op. 87-1 Through 87-4

### AVAILABILITY OF BOUND VOLUMES

See inside back cover for ordering instructions

THE DEPARTMENT OF THE TREASURY  
U.S. Customs Service

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# U.S. Customs Service

## *Treasury Decision*

19 CFR Part 4

(T.D. 87-16)

### AMENDMENT TO THE CUSTOMS REGULATIONS CONCERNING THE COASTWISE TRANSPORTATION OF CERTAIN ARTICLES BY VESSELS OF THE IVORY COAST

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document amends the Customs Regulations to add the Ivory Coast to the lists of nations which permit vessels of the U.S. to transport certain articles specified in § 27, Merchant Marine Act of 1920, as amended, between their ports.

Customs has been furnished satisfactory evidence that the Government of the Ivory Coast places no restrictions on the transportation of certain specified articles by vessels of the U.S. between ports in that country. This amendment provides reciprocal privileges for vessels registered in the Ivory Coast.

EFFECTIVE DATE: The reciprocal privileges for vessels registered in the Ivory Coast became effective on December 31, 1986.

FOR FURTHER INFORMATION CONTACT: Paul Hegland, Carriers, Drawback & Bonds Division, U.S. Customs Service, 1301 Constitution Avenue, NW., Washington, D.C. 20229 (202-566-5706).

#### SUPPLEMENTARY INFORMATION:

##### BACKGROUND

Section 27, Merchandise Marine Act of 1920, as amended (46 U.S.C. 883) (the "Act"), provides generally that no merchandise shall be transported by water, or by land and water, between points in the U.S. except in vessels built in and documented under the laws of the U.S. and owned by U.S. citizens. However, the 6th proviso of the Act, as amended by Pub. L. 89-194 (79 Stat. 823, T.D. 66-176) and Pub. L. 90-474 (82 Stat. 700, T.D. 68-227), provides that upon a finding by the Secretary of the Treasury, pursuant to information obtained and furnished by the Secretary of State, that a for-

eign nation does not restrict the transportation of certain articles between its ports by vessels of the U.S., reciprocal privileges will be accorded to vessels of that nation, and the prohibition against the transportation of those articles between points in the U.S. will not apply to its vessels.

Section 4.93(b)(1), Customs Regulations (19 CFR 4.93(b)(1), lists those nations found to extend reciprocal privileges to vessels of the U.S. for the transportation of empty cargo vans, empty lift vans, and empty shipping tanks. Section 4.93(b)(2), Customs Regulations (19 CFR 4.93 (b)(2)), lists those nations found to extend reciprocal privileges to vessels of the U.S. for the transportation of equipment for use with cargo vans, lift vans, or shipping tanks; empty barges specifically designed for carriage aboard a vessel and certain equipment for use with these barges; certain empty instruments of international traffic; and certain stevedoring equipment and material.

On December 29, 1986, the Department of State advised the Director, Carriers, Drawback and Bonds Division, of the Customs Service Headquarters, that the Government of the Ivory Coast places no restrictions on the transportation of the articles listed in the Act by vessels of the U.S. between ports in the Ivory Coast. The effective date of such notification was December 31, 1986.

The Carriers, Drawback and Bonds Division is of the opinion that satisfactory evidence has been furnished to establish the reciprocity required in § 4.93(b). Therefore, the Director of that Division has determined that, effective retroactively to December 31, 1986, the Ivory Coast should be added to the lists of nations set forth in § 4.93(b)(1) and (2).

By Treasury Department Order 165-25 the Secretary of the Treasury has delegated authority to the Commissioner of Customs to prescribe regulations relating to §§ 4.22, 4.81a(b), 4.93(b)(1) and (b)(2), 4.94(b), and 10.59(f), Customs Regulations (19 CFR 4.22, 4.81a(b), 4.93(b)(1) and (b)(2), 4.94(b), and 10.59(f)). These sections relate to lists of nations entitled to preferential treatment in Customs matters because of reciprocal privileges accorded to vessels and aircraft of the U.S. Subsequently, by Customs Delegation Order No. 66 (T.D. 82-201, dated October 13, 1982, the Commissioner delegated this authority to the Assistant Commissioner (Commercial Operations), who re-delegated this authority to the Director, Office of Regulations and Rulings, who then re-delegated it to the Director, Regulations Control and Disclosure Law Division.

#### FINDING

On the basis of the information received from the Secretary of State, as described above, it is determined that the Government of the Ivory Coast places no restrictions on the transportation of the articles specified in the 6th proviso of § 27 of the Merchant Marine Act of 1920, as amended, by vessels of the U.S. between ports in the

Ivory Coast. Therefore, reciprocal privileges are accorded as of December 31, 1986, to vessels registered in the Ivory Coast.

#### LIST OF SUBJECTS IN 19 CFR PART 4

Customs duties and inspection, cargo vessels, maritime carriers, vessels.

#### REGULATIONS AMENDMENTS

To reflect the reciprocal privileges granted to vessels registered in the Ivory Coast, Part 4, Customs Regulations (19 CFR Part 4), is amended in the following manner:

#### PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

1. The authority citation for Part 4 continues to read as follows:

**Authority:** 5 U.S.C. 301, 19 U.S.C. 66, 1624; 46 U.S.C. 3, 2103; § 4.93 also issued under 19 U.S.C. 1322(a); 46 U.S.C. 883.

2. Sections 4.93(b)(1) and (b)(2), Customs Regulations (19 CFR 4.93(b)(1), (b)(2)), are amended by adding "Ivory Coast", in appropriate alphabetical order to the lists of nations entitled to reciprocal privileges.

#### INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this is a minor amendment in which the public is not particularly interested and there is a statutory basis for the described extension of reciprocal privileges, notice and public procedure pursuant to 5 U.S.C. 553(b)(B) are unnecessary. In accordance with 5 U.S.C. 553(d)(1), a delayed effective date is not required because this amendment grants an exemption.

#### INAPPLICABILITY OF REGULATORY FLEXIBILITY ACT

This document is not subject to the provisions of 5 U.S.C. 603, 604, as added by § 3 of Pub. L. 96-354, the Regulatory Flexibility Act." That Act does not apply to any regulations such as this for which a notice of proposed rulemaking is not required by the Administrative Procedure Act (5 U.S.C. 551 *et seq.*) or any other statute.

#### EXECUTIVE ORDER 12291

This amendment does not meet the criteria for a major regulation as defined in § 1(b) of E.O. 12291. Accordingly, a regulatory impact analysis is not required.

#### DRAFTING INFORMATION

The principal author of this document was Bruce J. Friedman, Regulations Control Branch, Office of Regulations and Rulings, U.S.

Customs Service. However, personnel from other Customs offices participated in its development.

Dated: January 27, 1987.

B. JAMES FRITZ,  
*Director, Regulations Control  
and Disclosure Law Division.*

[Published in the Federal Register, February 5, 1987 (52 FR 3602)]

# U.S. Court of Appeals for the Federal Circuit

(Appeal No. 86-1441)

CERAMICA REGIOMONTANA, S.A. AND INDUSTRIAS INTERCONTINENTAL, S.A.,  
APPELLANTS *v.* UNITED STATES, ET AL., APPELLEES

*Irwin P. Altschuler*, Brownstein Zeidman and Schomer, of Washington, D.C., argued for appellants. With him on the brief were *Steven P. Kersner* and *David R. Amerine*.

*A. David Lafer*, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for appellee United States. With him on the brief were *Richard K. Willard*, Assistant Attorney General and *David M. Cohen*, Director.

*Kevin P. O'Rourke*, Howrey and Simon, of Washington, D.C., argued for appellee Tile Council of America. With him on the brief were *David C. Murchison*, *John F. Bruce* and *Rosemary Henry*.

Appealed from: U.S. Court of International Trade.  
*Chief Judge Re.*

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(Appeal No. 86-1441)

CERAMICA REGIOMONTANA, S.A. AND INDUSTRIAS INTERCONTINENTAL, S.A.,  
APPELLANTS *v.* UNITED STATES, ET AL., APPELLEES

(Decided February 2, 1987)

Before NIES, BISSELL and ARCHER, *Circuit Judges*.

Per CURIAM.

Ceramica Regiomontana, S.A., and Industrias Intercontinental, S.A., appeal the judgment of the United States Court of International Trade, 636 F. Supp. 961 (1986) (Re, C.J.), which affirmed the final results of an administrative review by the Commerce Department's International Trade Administration (ITA) of a countervailing duty order for ceramic tile from Mexico. 49 Fed. Reg. 9,919 (1984). We affirm.

Ceramica and Industrias contend that the methodology used by the ITA to calculate the countervailing duty rates was improper as a matter of law and was not supported by substantial evidence.

Appellants urge that the Mexican government figures on certain benefits paid to exporters under the Mexican government's Certifi-

cado de Devolucion de Impuesto (CEDI) program were "verified," and, as a matter of law, had to be used to calculate the duty. The ITA checked the two largest exporters, namely, appellants, found that their benefits were grossly understated, and that they had received the maximum CEDI benefits (15 per cent). This led the ITA to adopt for exporters receiving any CEDI benefits a methodology based on the maximum CEDI benefits because all exporters were entitled to receive that amount. Appellants, when pressed by the court at oral argument, could point to no evidence to support their "verification" argument. Appellants submitted no evidence with respect to the monetary benefits actually received by the other Mexican exporters who took advantage of the subsidy. Under these circumstances ITA was not required to use the figures supplied by the Mexican government.

Appellants argue that the trial court affirmed the agency's determination on grounds not expressly articulated by the agency. It is correct that a "reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." *SEC v. Chenery*, 332 U.S. 194, 196 (1947). That proposition, however, does not compel reversal of the judgment in this case. The ITA gave a full and rational explanation of the basis for its two-tier system, and the use of the maximum CEDI rate. The trial court found that "the ITA determined that the statistics submitted by the Mexican government with respect to CEDI benefits did not provide an adequate basis accurately to assess benefits under this program." 636 F. Supp. at 967. The ITA, not the court, rejected those statistics. The lack of an explicit statement in the agency's published notices to the effect that the ITA, therefore, utilized "the best information available" has prevented neither the trial court nor this court from discerning the path of the agency in its decision-making process. A court may "uphold [an agency's] decision of less than ideal clarity if the agency's path may reasonably be discerned." *Bowman Transportation v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974); *Colorado Interstate Gas Co. v. FPC*, 324 U.S. 581, 595 (1945). No new ground was interjected by the trial court.

Accordingly, we affirm on the basis of the thorough opinion of the Court of International Trade.

**AFFIRMED**

# United States Court of International Trade

One Federal Plaza

New York, N.Y. 10007

*Chief Judge*

Edward D. Re

*Judges*

Paul P. Rao

James L. Watson

Gregory W. Carman

Jane A. Restani

Dominick L. DiCarlo

Thomas J. Aquilino, Jr.

Nicholas Tsoucalas

*Senior Judges*

Morgan Ford

Frederick Landis

Herbert N. Maletz

Bernard Newman

Samuel M. Rosenstein

Nils A. Boe

*Clerk*

Joseph E. Lombardi

1870-1871

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# Decisions of the United States Court of International Trade

(Slip Op. 87-1)

ZENITH ELECTRONICS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-06-00788

INDEPENDENT RADIONIC WORKERS OF AMERICA, ET AL., PLAINTIFF *v.* UNITED STATES, DEFENDANT

Court No. 85-07-00905

[Defendant-intervenor's motion to dismiss denied.]

## ORDER

*Frederick L. Ikenson, P.C. (Frederick L. Ikenson and J. Eric Nissley)*, for plaintiff Zenith Electronics Corporation.

*Collier, Shannon, Rill & Scott (Paul D. Cullen, Patrick B. Fazzone and Lawrence J. Lasoff)*, for plaintiffs Independent Radionic Workers of America, et. al.

*Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch (*Velta A. Melnbrensis*), for defendant.

*Sharretts Paley Carter & Blauvelt, P.C. (Gail T. Cumins and Neil H. Marshak)*, for defendant-intervenors, Sanyo Electric Co., Ltd.

WATSON, *Judge*: Sanyo Electric Co., Ltd. ("Sanyo"), a defendant-intervenor in this consolidated action, moves for dismissal of the complaints of plaintiff Zenith Electronics Corporation ("Zenith") and plaintiffs Independent Radionic Workers of America, et al. ("Unions") as they relate to Sanyo. Sanyo also seeks a declaration that the challenged antidumping review determination of the Commerce Department was lawful with respect to imported Sanyo merchandise.

In support of its motion, Sanyo states that all of plaintiffs' claims either have been resolved adversely to the plaintiffs in prior litigation, or are factually not applicable to the covered entries manufactured by Sanyo. The Court has previously granted judgment upon the agency record on certain of plaintiffs' claims, see *Zenith Electronics Corp. v. United States*, 11 CIT —, 633 F. Supp. 1382 (1986), and those matters are currently remanded to the Commerce Department for a redetermination.

Zenith and the defendant correctly point out that Sanyo's motion misconceives the nature of these judicial proceedings. Zenith and the Unions initiated these actions for the purpose of challenging an administrative review determination relating to a prior antidumping finding. The actions were brought against "The United States", not against any foreign manufacturer or its imports. Consequently, there are no claims against Sanyo which are subject to dismissal.

The Court's task is merely to decide whether the challenged determination was lawful and supported by substantial evidence. Where the Court finds error and remands to the Commerce Department for a redetermination, it is Commerce which applies the redetermination to specific entries as the facts warrant. It would be premature and improper for the Court to declare at this juncture that the redetermination should not affect entries of a specific foreign manufacturer.

Because the Court concludes that Sanyo's motion is not well-taken, it is hereby denied.

So ORDERED.

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(Slip Op. 87-2)

UNITED STATES, PLAINTIFF *v.* KINGSHEAD CORP., DEFENDANT

Court No. 82-8-01145

Before RAO, *Judge*.

MEMORANDUM OPINION AND ORDER

[Defendant's motion for summary judgment denied; plaintiff's cross-motion for partial summary judgment denied.]

(Dated January 7, 1987)

*Richard K. Willard*, Assistant Attorney General, *David M. Cohen*, Director, Commercial Litigation Branch, Civil Division, (*Elizabeth C. Seastrum* on the brief) for plaintiff.

*Shaw, Goldman, Lecitra, Levine & Weinberg* (*Robert E. Goldman*, *Marc A. Pergamest* and *Glenn Mitchell* on the brief) for defendant.

**RAO, Judge:** This action arises under § 592 of the Tariff Act of 1930, as amended (19 U.S.C. § 1592). Plaintiff seeks to enforce penalties and to collect customs duties on 71 entries of scissors imported from Italy, allegedly accompanied by fraudulent invoices and entry papers.

Defendant seeks summary judgment in its favor and dismissal of the complaint because of an agreement between the parties in the form of a consent judgment in the case of *United States of America v. \$10,500.00 and a Letter of Credit in the Amount of \$15,472.00*, United States District Court of New Jersey, Civil Action No. 78-672 (Judge Buinno). Defendant relies on Paragraph 2 of said settlement

agreement (approved by Judge Buinno on January 25, 1979), which states:

2. Plaintiff agrees to accept the sum of twelve thousand eight hundred dollars (\$12,800.00) in full settlement of any and all claims which its agencies and their assigns may currently have against Kingsford Corp., its principals and employees including but not limited to defendant items, \$10,500.00 and a letter of credit in the amount of \$15,472.00, arising out of the seizures alleged in the complaint.

The United States Customs Service (Customs) had seized a shipment of defendant's merchandise on December 2, 1976 and another on January 10, 1977, and thereafter initiated a thorough investigation of defendant's importations of scissors from Italy for the period of January 1, 1973 to about January 1, 1977. Customs examined a total of 73 shipments in all, including the two seized shipments. The civil action which resulted in the consent settlement was filed by the government on March 31, 1978.

It is defendant's position that the consent judgment covers all claims which the government had against it at the time the consent judgment was signed, including the 71 shipments that are the subject of the instant action.

Plaintiff's position is that the consent judgment is limited to the two seized entries alleged in the complaint in Civil Action No. 78-672, *supra*, and that its claims arising from the 71 other entries were not included since they were asserted a year and a half after the date of the consent settlement. Plaintiff also asserts that it would be illogical for the government to compromise and settle claims estimated at approximately \$700,000 for as small an amount as \$12,500. Plaintiff moves for partial summary judgment to the effect that the consent judgment filed in Civil Action No. 78-672 does not bar the government's causes of action in the instant case.

The issue before the Court is whether it can be determined, as a matter of law, that the language in Paragraph 2 of the consent judgment releases all claims the government had against defendants, including those against the 71 entries under investigation at that time (as defendant alleges), or only those encompassed in the two entries which Customs seized (as plaintiff alleges).

In ruling on cross-motions for summary judgment, the court must determine if any genuine issues of material fact exist. Evidentiary evidence which the court will consider includes the pleadings, the official record, the statement of material facts annexed to the motion, sworn affidavits setting forth facts which would be admissible in evidence, answers to interrogatories, and other evidence which would be admissible at trial. *American Motorists Insurance Co. v. United States*, 5 CIT 33 (1983). However, where parties disagree as to whether certain facts are in dispute, and the court finds that genuine issues of fact exist, summary judgment should be denied. *Shell Oil Co. v. United States*, 84 Cust. Ct. 255, C.R.D. 80-4 (1980).

The Court must determine whether a genuine dispute exists as to the effect of the consent judgment entered into by the parties.

Both settlements and releases are contracts to which the ordinary rules of contract interpretation apply. A release has been defined as the relinquishment, concession, or giving up of a right, claim or privilege. Releases are contractual in nature and whether a release is general or specific depends on the intention of the parties. Therefore, in order for there to be a settlement or release, the parties must have intended to discharge the claims alleged to have been discharged. *Mikropul Corp. v. Desimone & Chaplin-Airtech, Inc.*, 599 F. Supp. 2d 940, 943 (1984).

Here, plaintiff strenuously asserts that the consent judgment which constituted the parties' agreement was never considered by it to be a settlement or release of any of its claims against the defendant except for those two seized entries specifically subject of the earlier case in the New Jersey District Court.

Because a factual dispute exists as to the intent of the parties at the time the consent judgment was approved by the District Court, this Court cannot, for the purposes of cross-motions for summary judgment, accept that a settlement and release exists as to the 71 entries being litigated in the instant action.

When contractual language is susceptible of at least two fairly reasonable interpretations, a triable issue of fact is presented and a grant of summary judgment is improper. *Heyman v. Commerce and Industry Insurance Co.*, 524 F.2d 1317. See also *Putnam v. Ostego Mutual Fire Ins. Co.*, 41 A.D.2d 981, 343 N.Y.S.2d 736 (1973), which held that where there is a conflict concerning the intention of the parties with respect to the alleged compromise and settlement, summary judgment should not be granted.

Even assuming, *arguendo*, that the Court could decide the efficacy of the language used in the consent judgment without reference to triable facts, it would not be possible to determine at this time whether the 71 entries do come within the ambit of the consent judgment, as defendant claims. The consent judgment releases "any and all claims which [the government,] its agencies and their assigns may currently have against [the defendant]." Defendant alleges that the 71 entries involved herein were under investigation by the plaintiff at the time the consent judgment was filed. The word "claim" has been defined as "a cause of action." *Black's Law Dictionary* (Fifth Edition.)

Whether the investigations had alerted the plaintiff to the fact that causes of action indeed existed because of the actions of defendant with respect to these entries is not clear from the affidavits and other papers submitted with the cross-motions for summary judgment. The Court is unable, therefore, to determine at this time, the scope of the words "any and all claims" used in the consent judgment.

Therefore, upon the defendant's motion for summary judgment, plaintiff's cross-motion for partial summary judgment, the supporting affidavits, briefs and all other papers filed in support of the motions, it is

ORDERED, ADJUDGED AND DECREED that defendant's motion for summary judgment is denied and that plaintiff's cross-motion for summary judgment is denied.

(Slip Op. 87-3)

PPG INDUSTRIES, INC., PLAINTIFF U. UNITED STATES, DEFENDANT, VITRO FLEX, S.A., AND CRISTALES INASTILLABLES DE MEXICO, S.A., DEFENDANT-INTERVENORS

Court No. 86-12-01546

Before CARMAN, *Judge*.

[Plaintiff's application for preliminary injunction granted.]

(Decided January 9, 1987)

#### MEMORANDUM OPINION

*Stewart and Stewart (Terence P. Stewart on the motion) for the plaintiff.*

*Brownstein, Zeidman and Schomer (David R. Amerine on the motion) for the defendant-intervenors.*

*Richard K. Willard, Assistant Attorney General; David M. Cohen, Director, commercial Litigation Branch, Civil Division, Department of Justice (Platte B. Moring, III on the motion) for the defendant.*

CARMAN, *Judge*: This Court issued an order on December 22, 1986 granting plaintiff's application for a preliminary injunction. This opinion follows the issuance of that order.

Plaintiff commenced this action pursuant to § 516(a)(2)(A)(i) of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516a(a)(2)(A)(i) (1980 & Supp. 1986) and 28 U.S.C. § 1581(c) (Supp. 1986), by filing a summons and complaint concurrently with an application for a temporary restraining order (TRO) and preliminary injunction. Plaintiff contests certain aspects of the final determination of the International Trade Administration (ITA) in its administrative review of the countervailing duty order covering fabricated automotive glass from Mexico.

On December 11, 1986, the Motion Part Judge, the Honorable Dominick L. DiCarlo, granted plaintiff's request for a TRO thus enjoining the defendant from liquidating all entries of fabricated automotive glass produced by two Mexican manufacturers and exporters, Cristales Inastillables de Mexico, S.A. (Crinamex), and Vitro Flex, S.A., which were entered or withdrawn on or after October 24, 1984 and exported on or before December 31, 1985. The matter was scheduled for a hearing at a time and place to be decided by the Court.

On December 18, 1986, this Court, upon the consent of all parties to this action, extended the TRO for an additional ten days. The hearing was scheduled for December 22, 1986. At the hearing, counsel for the Mexican manufacturers moved to intervene as of right and opposed plaintiff's motion for a preliminary injunction. The defendant United States consented to the issuance of a preliminary injunction. The Court granted the motion to intervene and issued an order enjoining the defendant from liquidating any and all entries covered by the previous request for a TRO and preliminary injunction. Pursuant to Rule 52 of the Rules of this Court, this opinion sets forth the findings of fact and conclusions of law to support the granting of the motion for a preliminary injunction.

#### DISCUSSION

A preliminary injunction is an extraordinary remedy that must be granted sparingly. It should be granted only upon a clear showing that the movant is entitled to the relief requested. *American Air Parcel Forwarding Co. v. United States*, 1 CIT 293, 298, 515 F. Supp. 47, 52 (1981).

When considering an application for a preliminary injunction, the Court must consider four factors: (1) the threat of immediate and irreparable injury; (2) the likelihood of success on the merits; (3) the public interest; and (4) the balance of hardships on all the parties. *Zenith Radio Corp. v. United States*, 710 F.2d 806 (Fed. Cir. 1983); *S.J. Stile Assoc. Ltd. v. Snyder*, 646 F.2d 522 (CCPA 1981); *Ceramica Regiomontana v. United States*, 7 CIT 390, 590 F. Supp. 1260 (1984); *Timken Co. v. United States*, 6 CIT 76, 569 F. Supp. 65 (1983); *American Air Parcel*, 1 CIT 293, 515 F. Supp. 47. In analyzing these criteria, the Court applies a "balance of hardship," or sliding scale approach. Essentially, the Court must ascribe to each factor its proper weight:

While considering the public interest in all cases, the critical factors are the probability of the irreparable injury to the movant should the equitable relief be withheld, and the likelihood of harm to the opposing party if the court were to grant the interlocutory injunction. Although the extraordinary remedy of a preliminary injunction is not available unless the moving party's burden of persuasion is met as to all four factors, the showing of likelihood of success on the merits is in inverse proportion to the severity of the injury the moving party will sustain without injunctive relief, *i.e.*, the greater the hardship the lesser the showing.

*American Air Parcel*, 1 CIT at 299-300, 515 F. Supp. at 53.

The critical question, therefore, is whether denial of the requested relief will expose the applicant to irreparable harm. The Court of Customs and Patent Appeals has interpreted this requirement as follows:

Only a viable threat of serious harm which cannot be undone authorizes exercise of a court's equitable power to enjoin before the merits are fully determined. A preliminary injunction will not issue simply to prevent a mere possibility of injury, even where prospective injury is great. A presently existing, actual threat must be shown.

*S. J. Stile*, 646 F.2d at 525 (citations omitted).

Plaintiff contends the liquidation of entries constitutes the irreparable injury necessary to satisfy one of the factors for granting a preliminary injunction. A number of cases have dealt with this precise issue.

In *Zenith*, 710 F.2d 806, the plaintiff commenced an action to challenge the results of an administrative review. The agency's findings had resulted in a reduction of dumping margins so that zero or minimal dumping duties would be assessed on entries during the review period.

Plaintiff sought a preliminary injunction to suspend the liquidation of the challenged entries. On appeal from the denial of the injunction, the Court of Appeals held that liquidation of entries would constitute irreparable injury sufficient to warrant the granting of injunctive relief pending the outcome of plaintiff's challenge on the merits. 710 F.2d at 810.

The *Zenith* Court was particularly concerned that liquidation would eliminate the only remedy available to the plaintiff for an incorrect review determination. The court reasoned since the statutory scheme contains no provision for reliquidation or the imposition of higher duties should plaintiff later be successful on the merits, once liquidation occurs, judicial review would be unavailing and ineffective. Allowing the liquidation to proceed would be tantamount to denial of the opportunity to challenge administrative determinations. *See id.* at 810-12.

The *Zenith* rationale was followed by this Court in *Timken Co. v. United States*, 6 CIT 76, 569 F. Supp. 65. *Timken* involved a motion for rehearing the issuance of a preliminary injunction to prevent the liquidation of entries of tapered roller bearings pending review of the administrative record. Ruling on the basis of *Zenith*, this Court concluded a threat of irreparable injury existed. *Timken*, 6 CIT at 79-80, 569 F. Supp. at 69. In a later decision, this Court stated in the absence of a preliminary injunction, liquidation prior to judicial review renders the controversy moot. *Ceramica*, 7 CIT at 396, 590 F. Supp. at 1265.

Liquidation of the entries would therefore cause plaintiff irreparable injury since it would deprive plaintiff of the opportunity for meaningful judicial review. The Court in reaching this conclusion, however, need not address the defendant-intervenors' contention that *Zenith* and *Timken* do not establish a conclusive presumption of immediate and irreparable injury. Rather, regardless of whether or not such a presumption exists, and this issue is not being ad-

dressed, the Court expressly finds that plaintiff has met its burden of demonstrating irreparable harm.

Defendant-intervenors also contend that *Zenith* and *Timken* require an independent showing of actual injury to sustain a finding of irreparable harm. They argue since plaintiff has not in fact suffered such injury and has failed to supply evidence of injury, irreparable harm has not been established.

A fair reading of *Zenith* and *Timken*, however, does not support the contention that a plaintiff must proffer *independent* evidence of actual injury. Although the *Zenith* Court stated that one of the factors affecting its decision was the existence of actual injury, the Court made clear that at least one other factor was important to its decision. The second factor relied upon by the *Zenith* Court was the desire for effective enforcement of the antidumping laws. In passing the Trade Agreements Act of 1979, Congress empowered the then Customs Court to enjoin liquidation of entries pending judicial review. See 19 U.S.C. § 1516a(c)(2). The grant of this power was intended in part to afford domestic interested parties an opportunity to obtain effective judicial review of agency determinations. To effectuate this intent, the *Zenith* Court held that liquidation of entries would constitute irreparable injury. Accordingly, our decision places particular emphasis upon this latter factor.

Defendant-intervenors contend plaintiff did not suffer actual injury. We disagree. Although the statistical conclusions set forth by the intervenors suggest the plaintiff's business has improved, the contention plaintiff has not suffered actual injury is conjectural and fails to effectively address the rationale of *Zenith* and *Timken*. Defendant-intervenors are also incorrect to argue increased sales alone indicate improved performance and lack of injury since many other factors influence profitability. Overall performance in turn is often effected by factors such as short-term cyclical changes.

The second factor to be considered in the determination of whether or not to grant a preliminary injunction is the likelihood plaintiff will succeed on the merits. This Court has held that the movant must show some probability of prevailing on the merits:

[I]t must be considered and balanced with the comparative injuries of the parties, an exercise involving a flexible interplay between the two criteria. Accordingly, although a showing that the moving party will be more severely prejudiced by a denial of the injunction than the opposing party would be by its grant does not remove the need to show some probability of prevailing on the merits, it does lower the standard that must be met. In such circumstances it will ordinarily be sufficient that the movant has raised questions which are "serious, substantial, difficult and doubtful."

*Timken*, 6 CIT at 80, 569 F. Supp. at 70 (citations omitted).

Plaintiff first contends the agency failed to take into account the ruling of this Court in *Cabot Corporation v. United States*, 10 CIT —, 620 F. Supp. 722 (1985), in its investigation of the counter-availability of Mexico's natural gas pricing practices. The second issue raised by plaintiff concerns the propriety of the agency's investigation of FICORCA programs and in particular whether or not benefits were targeted to a restricted group of companies. In raising these issues, plaintiff suggests the agency has derogated from the clear mandates of the statute and the decisions construing it. Taken together, the questions posed are difficult, doubtful, substantial, and serious.

The third issue raised by plaintiff concerns the agency's calculation of net benefit bestowed upon exports of fabricated automotive glass from the FOMEX export financing program. Plaintiff contends the ITA's calculations do not reflect the effects of compensating balances. Defendant intervenors contend at least with respect to the agency's final determination, the rates take account of compensating balances. Defendant intervenors admit a factual issue is raised whether or not the rates used in the original investigation reflected the effect of compensating balances. Considering all the issues raised by plaintiff as a whole, it is clear plaintiff has raised important and difficult questions that merit fuller consideration. Although plaintiff must overcome some serious problems with its position, it is conceivable plaintiff will ultimately succeed on the merits.

The third criterion which must be considered is whether issuance of the preliminary injunction will cause harm to the other interested parties. At the hearing, counsel for the defendant stated the government routinely consents to requests for enjoining the liquidation of entries. He stated while the government takes no position on the merits, the government does not oppose plaintiff's motion.

Defendant-intervenors advert to three parties likely harmed if the injunction is granted. Importers would be injured since they would not have access to monies deposited as estimated duties until the case is decided and the entries are liquidated. The government would be harmed if the amount held as estimated duties was determined to have been erroneous. In accordance with 19 U.S.C. § 1671f, the government must refund the deposit to the extent the deposit exceeds the amount determined to be due *together with interest*. Finally, defendant-intervenors have been harmed since all benefits determined countervailable have been renounced.

At the hearing, defendant-intervenors acknowledged the funds held by the government as estimated duties are earning interest thus offsetting any potential liability of the government. Since the government also does not oppose this motion, we agree with plaintiff that the government apparently will not be harmed if the injunction is granted. It is also therefore unnecessary to require plain-

tiff to post a bond to cover the amount of damages incurred by the government as a result of the injunction.

While fully cognizant of the potential harm to the importers and the defendant-intervenors if the injunction is granted, we are nevertheless convinced that this potential and thus speculative harm is outweighed by the extent of harm plaintiff will incur if the injunction is denied. To offset this harm, defendant-intervenors seek to require plaintiff to give security for the costs or damages that might be incurred or suffered by the defendant-intervenors as a result of the injunction that directs the government not to liquidate the subject entries. The damages to which the defendant-intervenors allude, however, seem at best conjectural. It is also doubtful that defendant-intervenors are entitled to this remedy under the Rules of this Court. Rule 65(c) requires the giving of security by an applicant seeking injunctive relief for costs and damages as "may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained." Since the injunctive order in this case runs to the defendant United States, and not the defendant-intervenors, and since the damages asserted by the defendant-intervenors appear speculative, the Court will not require the posting of security.

The last factor to be considered is whether the public interest will be served by the issuance of injunctive relief. On this issue, the decision of this Court in *Ceramica* is helpful: "there can be no doubt that [the public interest] is best served by ensuring that the ITA complies with the law, and interprets and applies our international trade statutes uniformly and fairly." 7 CIT at 397, 590 F. Supp. at 1265.

In this case, the public interest would be served best by granting the injunction. Plaintiff has raised substantial questions bearing upon the propriety of the agency's actions. An injunction will preserve plaintiff's rights until the merits and the issue of compliance with the law are fully considered. It will provide interim relief until those doubts that have been raised are eliminated. Any inconveniences that arise as a result of granting the injunction are outweighed by the irreparable harm and injury plaintiff will incur if the entries are liquidated.

#### CONCLUSION

Plaintiff has put forth persuasive arguments to support its motion for a preliminary injunction. In considering and balancing the four factors necessary to support a preliminary injunction, we hold that plaintiff is entitled to the relief requested.

(Slip Op. 87-4)

JEANNETTE SHEET GLASS CORP., PLAINTIFF *v.* UNITED STATES, DEFENDANT AND CRYSTAL INTERNATIONAL CORP., AND FLACHGLAS A.G., INTERVENORS, GLAVERBEL, S.A., INTERVENOR, ERIE SCIENTIFIC CO., A DIVISION OF SYBRON CORP., AND ERIE-ELECTROVERRE, S.A., A WHOLLY OWNED SUBSIDIARY OF SYBRON CORP., INTERVENORS

Court No. 83-5-00729

Before BERNARD NEWMAN, *Senior Judge*.

PRELIMINARY NEGATIVE DETERMINATIONS OF INTERNATIONAL TRADE COMMISSION IN THE MATTER OF THIN SHEET GLASS FROM SWITZERLAND, BELGIUM, AND THE FEDERAL REPUBLIC OF GERMANY—DEFENDANT'S MOTION FOR RECONSIDERATION OF PREVIOUS COURT ORDERS IN LIGHT OF AMERICAN LAMB CO. *v.* UNITED STATES

In light of *American Lamb Co. v. United States*, 4 CAFC—, 785 F.2d 994 (Fed. Cir. 1986) and the July 8, 1986 order of the Federal Circuit in *Jeannette Sheet Glass Corp. v. United States*, Appeal Nos. 86-519 and 86-700, defendant's motion for reconsideration of this court's previous orders of March 22, 1985 and September 10, 1985, and for affirmance of the International Trade Commission's original preliminary negative determinations of April 27, 1983 regarding regular quality thin sheet glass from Switzerland, Belgium and the Federal Republic of Germany is granted.

The Commission majority in its original preliminary negative determinations regarding regular quality thin sheet glass from Switzerland, Belgium and the Federal Republic of Germany properly applied the statutory "reasonable indication" standard (19 U.S.C. § 1673b(a)), as enunciated by the Federal Circuit in *American Lamb*. On the basis of the entire administrative record, the court finds that the Commission's determinations were not arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law.

[On reconsideration, International Trade Commission's preliminary negative determinations affirmed.]

(Decided January 9, 1987)

*Stewart and Stewart* (Eugene L. Stewart, Terence P. Stewart and James R. Cannon, Jr., Esqs.), Special Counsel for plaintiff.

*Lyn M. Schlitt*, General Counsel and *Michael P. Mabile*, Assistant General Counsel and *Stephen McLaughlin*, Esq., for defendant.

*Mudge Rose Guthrie Alexander & Ferdon* (N. David Palmeter and Alan H. Price, Esqs. of counsel), for intervenors Crystal International Corporation and Flachglas A.G.

*Ulmer, Berne, Laronge, Glickman & Curtis* (Morton L. Stone and Ronald H. Isroff, Esqs., of counsel) for intervenor Glaverbel.

*Hodgson, Russ, Andrews, Woods & Goodyear* (Victor T. Fuzak, Anthony L. Dutton and Craig M. Indyke, Esqs., of counsel) for intervenors Erie Scientific Company and Erie-Electroverre, S.A.

BERNARD NEWMAN, *Judge*:

## INTRODUCTION

In this action, plaintiff challenges the preliminary negative determinations of the International Trade Commission ("Commission") issued in antidumping investigations pursuant to 19 U.S.C. § 1673b(a). The Commission's preliminary determinations found: (1)

no "reasonable indication" that plaintiff, the sole domestic producer of thin sheet glass, is materially injured or threatened with material injury by reason of imported "regular quality" thin sheet glass from Switzerland, Belgium or the Federal Republic of Germany allegedly sold at less than fair value ("LTFV"); and (2) no reasonable indication that plaintiff is materially retarded in the establishment of a "high quality" thin sheet glass industry by reason of imports of such glass from Belgium or the Federal Republic of Germany allegedly sold at LTFV. *Thin Sheet Glass from Switzerland, Belgium and the Federal Republic of Germany*, Inv. Nos. 731-TA-127, 128 and 129 (Preliminary), USITC Pub. No. 1376 (May 1983). In view of the foregoing negative determinations, the antidumping investigations were terminated and notice of such termination was published on May 11, 1983 (48 Fed. Reg. 21213 (1983)).

Jeannette commenced this action on May 17, 1983 challenging the Commission's preliminary negative determinations. So far as pertinent here, plaintiff asserted as grounds for reversing the Commission's determinations:

1) The Commission's determinations were not in accordance with the "reasonable indication" standard as articulated in *Republic Steel Corp. v. United States*, 8 CIT 29, 591 F. Supp. 640 (1984), *reh'g denied*, 9 CIT —, Slip Op. 85-27 (March 11, 1985); and

2) The determinations were arbitrary, capricious, an abuse of discretion and otherwise not in accordance with law.

In an opinion and order dated March 22, 1985, 10 CIT —, Slip Op. 85-35, 607 F. Supp. 123 (1985), this court, following *Republic Steel*, reversed the preliminary determinations of the Commission that there was no reasonable indication the domestic regular quality thin sheet glass industry was materially injured or threatened with material injury by reason of imports allegedly sold at LTFV, and remanded the action to the Commission for reconsideration of its preliminary negative determinations in compliance with *Republic Steel*.<sup>1</sup>

On remand the Commission complied with what it regarded as the "reasonable indication" standard prescribed by *Republic Steel*, and reached preliminary affirmative determinations on the basis that the petition filed by Jeannette raised the possibility of material injury or threat of material injury. Also, in conformity with *Republic Steel* and the court's order of March 22, 1985, the Commission on remand did not weigh conflicting evidence in reaching its determinations. As a result of the remand proceeding, the Commission is-

<sup>1</sup> By order of March 22, 1985, this court affirmed the Commission's preliminary negative determination respecting material retardation of the establishment of a high quality thin sheet glass industry in the United States. 607 F. Supp. at 131-33. Regarding that aspect of the case, on November 26, 1986 plaintiff moved pursuant to Rule 54(b) for an order directing entry of a final judgment. An order is being entered concurrently herewith denying plaintiff's Rule 54(b) motion as moot. Granting defendant's present application for reconsideration and affirmance of the original negative determinations of April 22, 1983 results in a final appealable order covering all aspects of this action and will allow the Federal Circuit to review this case in its entirety rather than piecemeal. See *Jeannette Sheet Glass Corp. v. United States*, Appeal Nos. 85-2455 and 86-609, (Fed. Cir. October 23, 1986), Slip Op. at 13-14 (Jeannette's appeal dismissed since September 10, 1985 order is nonfinal).

sued preliminary affirmative determinations on July 12, 1985. USITC Pub. 1727 (July 1985).

By an unpublished order dated September 10, 1985 this court, on the basis of the entire administrative record, affirmed the July 12, 1985 remand results of the Commission.

Subsequent to this court's order of September 10, 1985 approving the results of the remand, and during the pendency of appeals from that order,<sup>2</sup> the Federal Circuit issued its decision in *American Lamb Co. v. United States*, 4 CAFC —, 785 F.2d 994 (Fed. Cir. 1986) on February 28, 1986. There, the appellate court concluded that the "ITC's method of proceeding in applying the statutory reasonable indication standard does not contravene but accords with clearly discernible legislative intent and is sufficiently reasonable. To the extent that *Republic Steel* and its progeny suggest otherwise, those decisions cannot stand." 785 F.2d at 1004.

As we have seen, the Federal Circuit on June 2, 1986 *sua sponte* dismissed the appeals from this court's order of September 10, 1985 holding that such order was nonfinal. *Jeannette Sheet Glass Corp. v. United States*, Appeal Nos. 86-519 and 86-700 (Fed. Cir. 1986). Thereafter, the Commission and several intervenors petitioned for rehearing. On July 8, 1986, the Federal Circuit by an unpublished order denied the petitions for rehearing, but without prejudice to: "(1) the Court of International Trade's amending its order to include a statement of certification under 28 U.S.C. § 1295(d)(1) [sic] or (2) the right of the Court of International Trade to change its order if so inclined." *Id.*

Defendant, International Trade Commission, has moved that in light of *American Lamb* and the Federal Circuit's order of July 8, 1986, this court reconsider its previous orders in this case, vacate its opinions and orders and affirm the Commission's original preliminary negative determinations issued on April 27, 1983.

In opposition to defendant's motion, plaintiff argues that the court in approving the Commission's remand results of July 12, 1985 "in essence applied the identical [reasonable indication] standard" thereafter pronounced by the Federal Circuit in *American Lamb* on February 28, 1986, since "the preliminary affirmative injury determination issued on remand was affirmed by this court on the basis of its own review of the entire record." Pltf's Brief in Opposition, at 1-2. Predicated on the foregoing contention, plaintiff insists that the Commission should be directed to proceed with final injury investigations and that the Commerce Department should be ordered to proceed with investigations of LTFV sales.<sup>3</sup>

<sup>2</sup> Defendant and certain intervenors appealed this order; but by an order dated June 2, 1986, these appeals were dismissed by the Federal Circuit *sua sponte* on the ground that the September 10, 1985 order was nonfinal. *Jeannette Sheet Glass Corp. v. United States*, Appeal Nos. 86-519 and 86-700 (Fed. Cir. 1986).

<sup>3</sup> Parenthetically, on October 23, 1985 Jeannette filed a separate action with the court (Court No. 85-10-01485) seeking an order to compel continuation of the antidumping investigation. Based upon the Commission's affirmative injury determinations on remand and 19 U.S.C. § 1673b(b), Jeannette urges that Commerce should proceed with a preliminary investigation of less than fair values sales. That action is pending decision on motions for summary judgment before Judge Paul P. Rao.

## OPINION

## I

Plaintiff's contention is patently without merit. In its March 22, 1985 order of remand, this court on the basis of *Republic Steel* rejected the Commission's approach to the "reasonable indication" standard, and directed the Commission to comply with *Republic Steel* in its reconsideration of the preliminary negative determinations. 607 F. Supp. at 130, 133. Specifically, in its March 22, 1985 decision this court found that the Commission's preliminary determinations were not in accordance with law, since conflicting evidence had been weighed by the Commission in reaching its determinations. 607 F. Supp. 128-130.

As previously noted, in *American Lamb* the Federal Circuit approved of the Commission's approach to applying the reasonable indication standard and expressly overruled *Republic Steel* and its "progeny".<sup>4</sup> The aspect of *Republic Steel* that the *American Lamb* court found particularly objectionable was the "mere possibility" criterion of reasonable indication and the proscription against the Commission's weighing of conflicting evidence. 785 F.2d at 1001-2, 1004. Thus, in *American Lamb* the Federal Circuit remanded the case to the Court of International Trade with instructions to vacate its order of remand which, as in the instant case, was predicated on *Republic Steel*.

In the remand proceedings in the current case, complying with *Republic Steel* and this court's order of March 22, 1985, the Commission explicitly did not weigh conflicting evidence in reaching its preliminary affirmative determinations. USITC Pub. 1727 at 5. In now seeking to have this court hold that its September 10, 1985 order approving the remand results on the basis of the entire record comports with *American Lamb* rather than with *Republic Steel*, plaintiff would require this court to turn a blind eye toward that vital aspect of the Commission's remand proceedings and the thrust of *American Lamb* (approving the Commission's weighing of conflicting evidence). While, as pointed up by plaintiff, this court in its order of September 10, 1985 affirmed the results of remand on the basis of the entire administrative record, by the same order this court implicitly approved of the Commission's compliance with that aspect of *Republic Steel* which barred the weighing of conflicting evidence. Clearly, then, this court's order of September 10, 1985 did not comply with the *American Lamb* rationale subsequently enunciated by the Federal Circuit on February 28, 1986.

In brief, since by the court's remand order of March 22, 1985 the Commission was directed to comply with *Republic Steel*, and was therefore barred from weighing conflicting evidence in its remand

<sup>4</sup> There can be no doubt that this court's decision in the present action of March 22, 1985 and its order of September 10, 1985 are "progeny" of *Republic Steel*. In *American Lamb*, the Federal Circuit specifically noted that this court's decision of March 22, 1985 applied the *Republic Steel* rationale. 785 F.2d at 1000. See also *Jeannette Sheet Glass Corp. v. United States*, Appeal Nos. 85-2455 and 86-609 (Fed. Cir. 1986), Slip Op. at 2-3.

proceedings, plaintiff's contention that this court's order of September 10, 1985 approving the remand results accords with *American Lamb* is rejected.

## II

In light of *American Lamb* and as suggested by the Federal Circuit's order of July 8, 1986 in Appeal Nos. 86-519 and 86-700, reconsideration of the previous decisions in the present case is entirely appropriate. This court now ineluctably concludes that the Commission, in reaching its original preliminary determinations of April 27, 1983 regarding regular quality thin sheet glass, properly applied the statutory "reasonable indication" standard when it considered the entire administrative record and weighed the conflicting evidence. The only remaining issue to be addressed in this case is whether the Commission's determinations were nevertheless arbitrary, capricious, an abuse of discretion or otherwise not in accordance with the law, as claimed by plaintiff.<sup>5</sup> See 19 U.S.C. § 1516a(b)(1)(A).

The foregoing standard of review, while requiring a searching and careful inquiry into the facts, is a narrow one and plainly deferential to the determinations, findings and conclusions of the agency. Under that standard, this court is not permitted to itself weigh the evidence and substitute its judgment for that of the agency, even though had the matter been raised initially before the court, its decision might have been different. *Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974); *Pasco Terminals, Inc. v. United States*, 83 Cust. Ct. 65, 87, 477 F. Supp. 201, 220, *aff'd* 634 F.2d 610 (Fed. Cir. 1980). Indeed, not only must the court avoid substituting its judgment for that of the agency, it may reverse the agency's action only where there is "a clear error of judgment" and where "there is no rational nexus between the facts found and the choices made." *Certified Color Manufacturers Association v. Mathews*, 543 F.2d 284, 294 (D.C. Cir. 1976) (quoting in part, *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. at 416). See also *Budd Co., Railway Division v. United States*, 1 CIT 67, 507 F. Supp. 997 (1980); *SCM v. United States*, 84 Cust. Ct. 227, C.R.D. 80-2, 487 F. Supp. 96 (1980).

That Congress intended traditional administrative law principles be applicable to judicial review of the Commission's preliminary determinations under the Antidumping Act is made manifestly clear in the legislative history of the Trade Agreements Act of 1979:

Section 516A would make it clear that traditional administrative law principles are to be applied in review of antidumping \* \* \* duty decisions where by law Congress has entrusted the decision-making authority in a specialized, complex economic situation to administrative agencies. Thus, review of any deter-

<sup>5</sup> The court has previously addressed the issues concerning cumulation, volume of imports and the yield factor in its opinion of March 22, 1985; the views expressed therein are adhered to and therefore will not be considered in this opinion.

mination listed in subsection (a)(1) [which includes 'reasonable indication' determinations by the Commission] would be to ascertain whether there was a rational basis in fact for the determination by the administrative decision-maker.

S. Rep. No. 96-249, 96th Cong., 1st Sess. 252 (1979), reprinted in 1979 U.S. Code Cong. & Ad. News 381, 638. See also *American Lamb*, 785 F. 2d at 1004.

The purpose of a preliminary injury determination is to "eliminate unnecessary and costly investigations which are an administrative burden and an impediment to trade." *American Lamb*, 785 F. 2d at 1002-03 (quoting S. Rep. No 1298, 93rd Cong., 2d Sess. 171). By prescribing the "arbitrary and capricious" standard of review, Congress obviously intended that the Commission shall apply its expertise and judgment at the preliminary stage of an antidumping investigation to determine whether the investigation should continue; and further intended that the court should not exercise its review powers to compel the continuation of an investigation that the Commission has rationally determined to be clearly lacking in substantive merit.

So far as pertinent to the Commission's preliminary determinations respecting material injury or threat of material injury to the regular quality thin sheet glass industry, the Commission majority (Chairman Eckes and Commissioner Haggart) made the following findings of fact:

1. Throughout the period of investigation, production of regular quality thin sheet glass was profitable and the profits remained comparatively stable. USITC Pub. 1376 at 8.

2. Domestic production, shipments and capacity utilization rose from 1980 to 1981, but then declined from 1981 to 1982. *Id.*

3. Employment remained stable and hours worked increased from 1980 to 1981, but both factors declined from 1981 to 1982. *Id.*

4. Inventories of regular quality thin sheet glass increased throughout the period under investigation. *Id.*

Here, in determining whether the "difficulties" experienced by the domestic industry were caused by the alleged LTFV imports, the Commission considered, among other things, underselling by the imports, lost sales, and price suppression resulting in lost revenues. *Id.* at 9. The Commission majority found that the domestic product frequently undersold the imports; and that in instances where there was underselling by the imports, the margin of underselling was "minimal". *Id.* at 10, 12. Significantly, lost sales and revenues were attributed by the majority to the lower quality of the domestic product in relation to the imports, and price was found not to be a determinative factor. *Id.* at 10-13.

Pertaining to threat of material injury, the Commission majority found in the negative based on the limited productive capacity or high levels of the capacity utilization of the exporters, absence of

any plans to shift sales from the European market to the United States, and levels of inventory. *Id.* at 11-13.

While differing conclusions could fairly be drawn from the conflicting evidence of record, the court finds that there is a rational basis for the majority Commissioner's determination that there was no reasonable indication that the alleged LTFV imports had caused material injury or threatened material injury respecting the regular quality thin sheet glass industry. The majority's factual predicates relating to Jeanette's quality problems, and that price was not a determinative factor in lost sales and revenues, is supported by substantial evidence and have a rational nexus under the statute to its negative determination.<sup>6</sup> The majority Commissioners found that the instances in which purchasers either reduced the quantity purchased from Jeannette or refused to purchase the domestic product resulted not from price differentials, but rather from the quality difference between the domestic product and the imports.<sup>7</sup> The Commission majority possessed the authority to exercise its economic expertise and judgment in evaluating the conflicting evidence regarding the quality factor in relation to the instances of underselling by the imports and Jeannette's lost sales and revenues. *American Lamb.*

Turning to threat of material injury, the Commission majority properly examined such factors as the exporters' levels of capacity utilization, expansion plans concerning exports to the United States, and levels of inventories. Moreover, the Commission—as required—determined whether the likelihood of injury is real and imminent and not merely supposition, speculation or conjecture. S. Rep. No. 249, 96th Cong. 1st Sess. 88-89 (1979); *Alberta Gas Chemicals Inc. v. United States*, 1 CIT 312, 515 F. Supp. 780, 790 (1981). There is substantial evidence that none of the producing countries had any intention or ability to significantly expand production, shift imports to the United States markets, or alter their product mix to increase competition with the domestic producer. Additionally, the producing countries reported limited or no inventories indicating an absence of ability to rapidly increase sales.

In short, the court finds nothing in the Commission majority's economic criteria or factual findings that make its negative determination regarding threat of material injury arbitrary, capricious, an abuse of discretion or otherwise contrary to law.

<sup>6</sup> The Commission majority found that Jeannette's lost sales and revenues were related to the lower quality of the domestic product compared with that of the imports, and that price was not a determinative factor. With regard to price, the majority found: the domestic product was frequently priced lower than the imports from Switzerland, and that in the few instances of underselling by the Swiss imports, the margin of underselling was minimal; the domestic product in most instances significantly undersold the Belgium imports, and the instances where the imports undersold the domestic product the levels of underselling were minimal. The Commission did not receive information on purchaser's prices paid for imports of regular quality thin sheet glass from West Germany.

<sup>7</sup> Dissenting Commissioner Stern's views of the quality issue differed from those of the majority Commissioners. Commissioner Stern was not satisfied that the quality factor alone explained why customers shifted from Jeannette to the imports and she further stressed the yield factor which was not specifically addressed by the majority Commissioners.

## CONCLUSION

For the foregoing reasons, and upon reconsideration of its previous orders in this case predating *American Lamb*, the court affirms the Commission's April 27, 1983 preliminary negative determinations concerning *Thin Sheet Glass from Switzerland, Belgium and the Federal Republic of Germany*. Accordingly, this court's opinion and order dated March 22, 1985 are vacated only to the extent that they were predicated upon the "reasonable indication" standard prescribed by *Republic Steel* and are adhered to in all other respects; further, this court's order of September 10, 1985 affirming the Commission's preliminary affirmative determinations on remand is vacated. Cf. *Armstrong Rubber Co. v. United States*, 10 CIT —, 614 F. Supp. 1252 (1985), *remanded with instructions to vacate*, Fed. Cir. App. No. 85-2707 (unpublished order dated April 7, 1986); *American Grape Growers Alliance for Fair Trade v. United States*, 10 CIT —, 615 F. Supp. 603 (1985), *remanded with instructions to vacate*, Fed. Cir. App. Nos. 85-2717 and 86-556 (unpublished order dated April 7, 1986).





# Index

## U.S. Customs Service

### Treasury Decisions

Ivory Coast added to list of nations; part 101, CR amended .....	T.D. No. 87-16
--	-------------------

### U.S. Court of Appeals for the Federal Circuit

Ceramica Regiomontana, S.A. and Industrias Intercontinental, S.A. v. United States, et al. ....	Appeal No. 86-1441
--	-----------------------

### U.S. Court of International Trade

Jeanette Sheet Glass Corp. v. United States .....	Slip Op. No. 87-4
PPG Industries, Inc. v. United States .....	87-3
United States v. Kingshead Corp. ....	87-2
Zenith Electronics Corp. v. United States; Independent Radionic Workers of America, et al. v. United States .....	87-1

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